AFFLUENT FREIGHT SDN BHD

v.

SUMATHI K APPUKUTTAN PILLAI & ANOR

HIGH COURT MALAYA, AHAH ALAM
ZULKEFLI MAKINUDIN J
[ORIGINATING SUMMONS NO: MT4-24-456-99]
6 DECEMBER 2001

LAND LAW: *Restraints on dealings - Caveat - Removal - Application by attorney of registered proprietor to remove caveat - Caveat entered by bona fide purchaser for value with consent of registered proprietor - Whether attorney not aggrieved party - Whether acting mala fide - Whether having no locus standi - National Land Code 1965, ss. 327, 340*

AGENCY: *Power of Attorney - Irrevocable Power of Attorney - Validity - Power of Attorney expressing itself as irrevocable but without valuable consideration by donee and without time period for applicability - Whether void and of no effect - Authority of agent - Whether acting mala fide - Power of Attorney Act 1949, ss. 6, 7*

The first respondent is the registered proprietor of a piece of land in Rawang, Selangor ('the property'). By a power of attorney dated 18 July 1997 ('PA'), the first respondent appointed the applicant as her attorney, purportedly for the purpose of finding prospective tenants for the property. On 10 December 1998, the first respondent sold the property to the second respondent, and the latter, upon making part payment thereof and with the consent of the first respondent, lodged a caveat against the property. However, on 23 March 1999, the applicant also sold the property to another purchaser, utilising the PA for the purpose. Perturbed by the applicant's action, the first respondent revoked the PA on 10 May 1999.

The applicant averred that it was a *bona fide* purchaser for value of the property, and in the circumstances applied to set aside the caveat under s. 327 National Land Code 1965. This apart, the applicant also applied for a restraining order to restrain the first respondent from dealing with the property. Before the learned judge, the primary question that arose was whether the applicant was in law "an aggrieved person" and therefore had the standing to make the application to remove the caveat.

Held:

[1] The applicant was not an "aggrieved party" within the meaning of s. 327 National Land Code 1965, and therefore had no standing or *locus standi* to commence this action for the removal of the caveat. (p 74 g)

[2] The applicant was an attorney and agent of the first respondent and as such could only take the action in a representative capacity. The first respondent, however, had never instructed the applicant to commence such an action. Further, in commencing the representative action, it seemed that the first respondent was suing herself and her second respondent purchaser, when in fact she never had such an intention. This action by the applicant was hence frivolous, vexatious and a gross abuse of the process of the court. (p 75 c)

[2a] Even if the applicant had the representative capacity to bring the action, it had, since the revocation on 10 May 1999, been stripped of that capacity. The applicant therefore did not have the capacity to maintain the action therefrom, and the action must fail on this ground also. (p 75 d-e)

[3] No payment was made by the applicant to the first respondent for the purchase of the property. There was also no evidence of any acquisition by the applicant company of the same. The applicant, therefore, was not a *bona fide* purchaser for valuable consideration of the property. The evidence, on the contrary, showed that the second respondent had paid for the property, and had thus become purchaser for value of the property. (p 75 f-g)

[4] The applicant, not being the registered proprietor of the property, and not being an aggrieved party, had no right to stop the registered proprietor from disposing of the property, nor the right to lift a caveat which had been lodged by a purchaser for valuable consideration of the property with consent from the proprietor. (p 76 f)

[5] The applicant had no *locus standi* to apply for a restraining order against the first respondent. On the facts, the applicant had clearly failed to satisfy the requirements of O. 29 r. 1(2A) Rules of the High Court 1980 for the grant of such injunctive order, and nor had it fulfilled the principles as set out in *American Cyanamid v. Ethicon* and *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah.* (p 76 i)

[6] The PA had fallen foul of ss. 6 and 7 respectively of the Power of Attorney Act 1949, for expressing itself as irrevocable when no valuable consideration was given and for so expressing itself when no fixed period of time being stated for its applicability. This aside, the applicant had also abused the PA and had acted *mala fide vis-a-vis* the PA. Clearly, the PA was void, invalid and of no effect. (p 78 b-c)

[Application dismissed.]

Case(s) referred to:
American Cyanamid v. Ethicon [1975] 1 All ER 504 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 ***(refd)***
Teh Bee v. Maruthamuthu [1977] 2 MLJ 7 ***(refd)***
Wu Shu Chen v. Raja Zainal Abidin Raja Hussin [1977] 2 MLJ 487 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 89(a), 327, 340
Power of Attorney Act 1949, ss. 6, 7
Rules of the High Court 1980, O. 29 r. 1(2A)

Other source(s) referred to:
Bowstead and Reynolds on Agency, 16th edn, p 673

For the applicant - Syed Zawawi; M/s Zawawi Vasan & Murtti.
For the respondent - Gary Teh; M/s Wiliam Leong

Reported by WA Sharif

JUDGMENT

Zulkefli Makinudin J:
This is an application by the applicant under s. 327 of the National Land Code ("the NLC") to set aside a caveat which has been lodged by the second respondent against the property of the first respondent and for a restraining order against the first respondent from dealing with the property. The said property is the land lot held under H.S.(D) 21590, PT 5381 Mukim Rawang, Daerah Gombak, Selangor ("the property").

Facts Of The Case
The relevant facts of the case are as follows:

(1) The applicant is the attorney of the first respondent *vide* a power of attorney ("PA") which was allegedly executed by the first respondent dated 18 July 1997. The genuineness of the contents of the PA is disputed by the first respondent. The first respondent alleged that she gave a PA to the applicant strictly for the purpose of assisting her in attending to the renting of the property to intending tenants.

(2) The first respondent had sold the property to the second respondent for the sum of RM130,000 on 10 December 1998. Upon making part payment in the sum of RM60,000, the second respondent lodged a private caveat against the property with the first respondent's consent.

(3) The applicant without the knowledge or consent of the first respondent utilised the PA to sell off the property on 23 March 1999 to a party by the name of Chew Huey Fen through M/s Khong & Jaafar (Real Estate) Sdn Bhd (exh. "VS10"). The first respondent first came to know about the said disposal to Chew Huey Fen through this originating summons. Upon receipt of the originating summons, the first respondent took action to revoke the PA on 10 May 1999.

(4) The applicant also alleged that the first respondent had at the outset purchased the property on its behalf.

Decision Of The Court

Having studied the respective affidavits filed on behalf of the applicant and the respondents and having studied the submissions made by learned counsels for the applicant and the respondents I hereby dismissed with costs the application of the applicant. The learned counsel for the respondents at the outset raised a preliminary objection on a number of issues relating to the applicant's application. However I do not find it necessary to deal with the said preliminary objection as I find that the issues raised can be effectively dealt with by the counsel for the respondents in the main argument opposing the application of the applicant. Deciding strictly on the basis of the merits of the application of the applicant the following are my grounds in dismissing the said application.

Firstly, it is my finding that the applicant company has no capacity or *locus standi* to commence this action for the removal of the second respondent's caveat as it is not an "aggrieved party". It is a well established principle that in order to have *locus standi*, a party seeking to lift a caveat lodged against a property has to be an "aggrieved party" within the meaning of s. 327 of the NLC. In the case of *Wu Shu Chen v. Raja Zainal Abidin bin Raja Hussin* [1977] 2 MLJ 487 the Court of Appeal defines the word "aggrieved" as follows:

> To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body.

The applicant in this case does not fall within the meaning of "aggrieved" as defined above. The capacity in which the applicant is taking this action is as the attorney and agent of the first respondent. This action is therefore a representative action. It means that the applicant is representing the first respondent (ie, suing for and on behalf of the first respondent) in bringing this action before the court. However this capacity of the applicant to commence this action is questionable.

The applicant has never been instructed by the first respondent to commence any representative action at any time whatsoever, especially this action. In commencing this action in a representative capacity for and on behalf of the first respondent, it seems that the first respondent is suing herself and her purchaser (the second respondent). At no time did the first respondent have any intention to sue herself and the purchaser. I am of the view that this action is in fact frivolous, vexatious and a gross abuse of the process of the court. The applicant hence cannot sue in its representative capacity in this action as it is suing the party which is actually giving it that capacity to sue.

It is also pertinent to note in this case that the PA has since 10 May 1999 been revoked. Even if the applicant had the representative capacity to bring this action, it has however since the revocation on 10 May 1999 been stripped of that capacity and does not have any capacity to maintain this action from that day onwards. Hence this action should fail.

On the evidence made available I find that the applicant is not a *bona fide* purchaser for valuable consideration of the property as it had claimed. There is no proof of any payment of consideration for the purchase of the property by the applicant. The applicant's exhs. "VS6" and "VS7" are not proof of payment by the applicant for the property as alleged. The sum of RM17,173.16 (including RM2 bank commission) which was debited on 18 February 1997 from the applicant's Hongkong Bank Account (exh. "VS6") was credited back to the same account two days later ie, 20 February 1997. Therefore no payment was made as alleged. Moreover the purpose under which that amount was debited from the applicant's account is not stated. The payment could have been made in the course of the applicant's business to its creditor.

The applicant being a company properly incorporated in Malaysia under the Companies Act 1965 is a legal entity. If it so wishes to purchase any property or asset, it has the right and the ability to do so provided that all the requirements under its memorandum and articles of association and the Companies Act 1965 are strictly complied with. In this case, there is no evidence of any acquisition by the applicant of the property and no evidence that authorisation has been given for the applicant company to do so. It is

also a fact that the applicant is not the registered proprietor of the property. The registered proprietor is the first respondent – (see exh. "VS1".) Under s. 340 of the NLC and the Torrens System, the first respondent's title is indefeasible and under s. 89(a) of the NLC the register of title is conclusive evidence of the ownership of the property. The private caveat has been lodged by the second respondent with the registered proprietor's (first respondent) consent. As the applicant is not the owner of the property, it has not been aggrieved by the lodging of the private caveat by the second respondent against the property (see the case of *Teh Bee v. Maruthamuthu* [1977] 2 MLJ 7). The relevant documents produced by the applicant such as exhs. "VS1", "VS3", "VS4" and "VS5" do not indicate that the first respondent was purchasing the property or holding the property on trust for anybody. The applicant has no interest whatsoever against the property. A person by the name of Vadivilu claimed to have purchased the property on behalf of the applicant. Vadivilu tendered exhs. "VS4" and VS5" as proof of purchase made by the applicant.

A perusal of those said exhibits do not state that the purchase was made on behalf of the applicant. The purchase was clearly made by Vadivilu in his personal capacity. However Vadivilu at that material time was a bankrupt (see exh. "SAP1" of first respondent's affidavit-in-reply dated 4 May 1999). That intended purchase did not go through. Even if it went through, it would be null and void as against the bankrupt's estate. A bankrupt has no capacity to enter into such a sale and purchase transaction.

It is clear that the applicant, by virtue of it being an attorney of a registered proprietor, does not become the proprietor of the property. As it is not and has never been an "aggrieved party" the applicant has no right to stop the registered proprietor from disposing of the proprietor's property if the proprietor so wishes nor the right to lift a caveat which has been lodged by a purchaser for valuable consideration of the property with consent from the proprietor.

Secondly, I find that the second respondent is a *bona fide* purchaser of the property for a valuable consideration. The second respondent was clearly contracting with the registered and beneficial owner of the property in paying the sum of RM60,000 to the first respondent as part payment towards the purchase of the property. The second respondent's purchase of the property was effected on 10 December 1998 (See exh. "SAP2" in first respondent's affidavit-in-reply dated 4 May 1997). Thereafter a caveat was lodged against the property by the second respondent with the consent of the first respondent.

Thirdly it is my finding that the applicant has no *locus standi* to apply for a restraining order against the first respondent when the requirements or the criteria for the grant of an injunctive order as stated under O. 29 r. 1(2A) of

the Rules of the High Court 1980 and under the principles set out in the celebrated cases of *American Cyanamid v. Ethicon* [1975] 1 All ER 504 and *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293 have not been satisfied by the applicant. The applicant in this case has failed to show that there is a serious question to be tried and where the balance of convenience lies in requesting the court to grant a final injunctive relief. I find that the interest of the applicant in obtaining a restraining order against the first respondent cannot be determined. Therefore the applicant lacks capacity to apply for the said restraining order. The applicant is not seeking for an interlocutory relief pending final disposal of the matter but for a final prohibitory injunction. The applicant has erred in the mode of seeking this final relief.

I find that prayer (b) of the applicant's originating summons which seeks to restrain the first respondent from dealing with the property has failed to comply with the strict requirements of O. 29 r. 1(2A) of the Rules of the High Court 1980 which *inter alia* states as follows:

(2A) The affidavit in support shall contain a clear and concise statement:

(a) of the facts giving rise to the claim against the defendant in the proceedings;

(b) of the facts giving rise to the claim for the interlocutory relief;

(c) of the facts relied on as justifying application *ex parte*, including details of any notice given to the defendant or, if none has been given, the reason for giving none;

(d) of any answer asserted by the defendant (or which he is thought likely to assert) either to the claim in the action or to the claim for interlocutory relief;

(e) of any facts known to the applicant which might lead the Court not to grant relief *ex parte;*

(f) of whether any previous similar ex *parte* application has been made to any other Judge, and if so, the order made in that previous application; and

(g) of the precise relief sought.

The requisite undertaking as to damages in application for injunctive relief has also not been given by the applicant. The applicant's action is hence defective and this defect is fatal and is not curable under the Rules of the High Court.

Validity Of The Power Of Attorney

There is also an issue on the validity of the power of attorney which has to be addressed in this case. The applicant claims to be the attorney of the first respondent ("the Donor") by virtue of a power of attorney purportedly dated 18 July 1997. I am of the view that the said power of attorney ("PA") is void, invalid and of no effect on the following grounds:

(1) The PA falls foul of s. 6 of the Power of Attorney Act 1949 (Act 424) in that it is expressed to be irrevocable even though no valuable consideration has been given by the applicant (the donee).

(2) The PA falls foul of s. 7 of the Power of Attorney Act 1949 (Act 424) in that being a PA which no valuable consideration has been given, it is expressed to be irrevocable without any fixed period of time being stated therein for its applicability.

(3) There is no evidence of any authorisation being given to the applicant company to accept the appointment by the first respondent to be her attorney. The applicant's appointment as attorney of the first respondent has fallen foul of its memorandum and articles of association and the Companies Act 1965.

(4) The first respondent disputes the contents of the PA (see paras. 11 to 14 first respondent's affidavit-in-reply). The first respondent states that the pages of the PA are distinct from the execution page. It is alleged that there is a possibility that the contents of the PA have been altered as none of the pages have been initialed or signed by the first respondent. After the execution, stamping and registration of the purported PA, the first respondent Donor has never received a copy of the said PA from the applicant. The first time that the first respondent sighted the PA after the execution was when she was served with this originating summons and the affidavit in support, wherein a copy of the PA was exhibited.

(5) The applicant has breached its obligations and duties to the first respondent as it has abused the purpose and the authority for which the PA was granted. The PA was executed by the first respondent for the purpose of enabling the applicant to assist her to rent out the property to parties interested in tenanting the property (see para. 11 first respondent's affidavit-in-reply). The applicant instead utilised the PA to sell the property to a person by the name of Chew Huey Fen through M/s Khong & Jaafar (Real Estate) Sdn Bhd (exh. "VS10").

(6) An attorney is only an agent of the principal, the Donor who in this case is the first respondent. The authority of an agent cannot exceed the limit of authority granted by the principal to the agent. An attorney cannot

question the actions of its principal. The general rule on the authority of an agent can bee seen by reference to the book *Bowstead and Reynolds on Agency* (16th edn) at p. 673. It is very clearly stated that the authority of the agent whether given by power of attorney, or informally, even if for consideration, and whether or not expressed to be irrevocable, is revocable without prejudice to the fact that such revocation may be wrongful as between principal and agent. An agent has no *locus standi* to take action against the principal save for instances of wrongful revocation of authority and even then the action is only for breach of contract. Hence the donee has no capacity to sue the Donor except under contract. In this case I find that there is clearly a gross abuse of the authority by the attorney in disposing the Donor's property without the Donor's consent. The purported sale of the property by the applicant has not been ratified by the first respondent. In fact, when the first respondent came to know about the intended disposal to Chew Huey Fen, the first respondent did whatever a reasonable person would do to revoke the PA which was in fact revoked on 10 May 1999 (exh. "SAP3" of first respondent's supplementary affidavit-in-reply dated 17 May 1999).

Purported Sale Of Property By The Applicant

The applicant's exh. "VS10" shows a purported sale of the property to a person by the name of Chew Huey Fen on 23 March 1999 through M/s Khong & Jaafar. However the applicant's exh. "VS13" reveals a letter dated 30 March 1999 of the solicitors, M/s CC Choo & Co, stating that they act for the purchasers of the property by the names of Kee Chin Hin and Wong Yen Leng (f) who have agreed to purchase the property *vide* a purported letter of offer dated 23 March 1999.

It would appear that the applicant has apparently offered to sell the first respondent's property to two different parties on the same date. The first respondent has been named as the vendor in both these transactions. This is however done without the knowledge or consent of the first respondent. I am of the view that the actions of the applicant are highly irregular and unconscionable to the intending purchasers as well as being clearly an abuse of the authority given to the applicant by the first respondent. The actions of the applicant in those instances are *mala fide*. To prevent further abuse of the PA by the applicant, the first respondent has rightly revoked the said PA. These two transactions which are purported to be entered into by the applicant for and on behalf of the first respondent are void as against the first respondent as no authority or consent of the first respondent for those purported transactions were given.